

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Appellate Case No. 2015-001813
Lower Case No. 2014-CP-07-1732

Marilyn W. Bunn, a person non compos mentis by and through her guardian, Denise Suddes, and Margaret Bunn Lochmandy Respondents,

v.

Douglas S. Delaney, as Trustee and in his individual capacity, Alan Wilson, the South Carolina Attorney General, Sacred Heart-Griffin High School, St. Joseph's Home, Quincy University, Notre Dame, The Lawrenceville School, All Saints Catholic Church, and Habitat for Humanity c/o All Saints Catholic Church..... Defendants,

Of Whom Douglas S. Delaney is the Appellant.

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT PROPERLY RULE THAT MARGARET LOCHMANDY BECAME THE SOLE SUCCESSOR INDIVIDUAL TRUSTEE UNDER THE SUCCESSOR PROVISION OF THE CHARITABLE REMAINDER TRUST?**

- II. **DID THE TRIAL COURT PROPERLY RULE THAT DENISE SUDDER AND MARGARET LOCHMANDY HAVE THE AUTHORITY TO REMOVE DELANEY AS THE SUCCESSOR INDEPENDENT TRUSTEE OF THE CHARITABLE REMAINDER TRUST WITHOUT CAUSE?**

STATEMENT OF THE CASE

On July 16, 2014 Respondents filed a Verified Petition seeking the following primary relief: (i) approval of Denise Suddes' and Margaret Bunn Lochmandy's removal of Douglas S. Delaney ("Delaney") as the successor independent trustee under the terms of the John M. and Marilyn W. Bunn Charitable Remainder Trust u/a/d December 16, 1993 (the "CRT"); (ii) (a) modification of the administrative provisions of the CRT due to circumstances not anticipated by the settlor such that modification will further the purposes of the CRT and will be in accordance with the settlors' probable intentions; (b) modification of the administrative terms of the CRT because administration under the existing terms is impracticable, wasteful, or impairs the CRT's administration; (iii) demand for an accounting; and (iv) Motion for a Temporary Restraining Order and/or Preliminary Injunction.¹ The original defendants were Delaney, as trustee and in his individual capacity, and Alan Wilson, the South Carolina Attorney General. On August 20, 2014, at the request of the Office of the Attorney General, Respondents filed an

¹ The Petition was originally filed in the Beaufort County Probate Court. On July 21, 2014, Respondents removed the action to the Circuit Court for the Fourteenth Judicial Circuit of South Carolina. (July 21, 2014, Order of Removal, signed by Heather R. Galvin, Associate Judge Beaufort County Probate Court.)

Amended Summons and Complaint in the Circuit Court, naming the CRT charitable beneficiaries, Sacred Heart-Griffin High School, St. Joseph's Home, Quincy University, Notre Dame, The Lawrenceville School, All Saints Catholic Church, and Habitat for Humanity c/o All Saints Catholic Church, as defendants.

On August 29, 2014, Delaney answered the Amended Complaint and asserted a counterclaim under the South Carolina Frivolous Proceedings Sanctions Act. On September 25, 2014, Respondents answered Delaney's counterclaim, denied the allegations, and asserted affirmative defenses.

On November 3, 2014, Respondents filed the Motion for Partial Summary Judgment (the "Motion for Summary Judgment"). Therein, Respondents sought to: (1) remove Delaney as the successor independent trustee of CRT without cause under the plain and unambiguous terms of Article III, Section 3 of the CRT; and, in the alternative, (2) to modify the CRT pursuant to S.C. Code Ann. 62-7-412(b) because the fees being charged to the CRT were wasteful. On February 5, 2015, Respondents filed a Memorandum in Support of the Motion for Summary Judgment. (Memorandum in Support of Summary Judgment, dated February 5, 2011.) On February 11, 2015, Respondents filed the supporting affidavit of Margaret Lochmandy. (February 11, 2015 Lochmandy Affidavit.)

A hearing on the Motion for Summary Judgment was conducted on March 16, 2015. Delaney appeared at the hearing with a Return to Plaintiffs' Motion for Summary Judgment and Memorandum in Opposition, including the supporting affidavit of Delaney, which was filed thereafter. (Return to the Motion for Summary Judgment, with attachments, dated March 16, 2015.) On April 30, 2015, Master-in-Equity, Marvin H.

Dukes, III, sitting as a Special Circuit Judge for the Fourteenth Judicial Circuit, issued a written order, granting partial summary judgment on the issue of removal of Delaney, as the successor independent trustee, without cause. (Order, dated April 30, 2015.)

On May 11, 2015, Delaney filed a Motion to Reconsider, Alter and/or Amend (the "Motion to Reconsider"). (Motion to Reconsider, dated May 11, 2015.) On May 29, 2015, Respondents filed a Memorandum in Opposition to the Motion to Reconsider. (Memorandum in Opposition to the Motion to Reconsider, dated May 29, 2015.) On July 16, 2015, Respondents submitted a supplemental affidavit of Margaret Lochmandy in opposition to the Motion to Reconsider. (July 16, 2015 Lochmandy Affidavit.) A hearing on the Motion to Reconsider was conducted on July 20, 2015, and on July 21, 2015, Judge Dukes denied the Motion to Reconsider. (Form 4 Order, dated July 21, 2015.) Delaney filed a Notice of Appeal on August 20, 2015. (Notice of Appeal, dated August 20, 2015.)

FACTS

On or about December 16, 1993, John Bunn and Marilyn Bunn, as settlors, created the CRT. (Am. Compl., Ex. A., hereinafter, referred to as the "CRT".) The purpose of the CRT was to distribute monthly payments for the benefit of the settlors during their lives, and, upon their deaths, the balance of the trust estate would be distributed to certain charities as set forth at Article I, Section 3 of the CRT. *Id.* John Bunn and Marilyn Bunn were named as the individual co-trustees of the CRT. (CRT, p. 1, ¶1.) Security Investment Management and Trust Co., was named as the corporate trustee. *Id.*

Article III, Section 1(a) of the CRT describes the duties of the corporate trustee. Section 1(a) states that the corporate trustee will “collect all income of the trust, maintain and have custody of all the records of the trust...” and “prepare a statement showing how the trust is invested....” The individual trustees’ duties are also contained in the CRT. (CRT, Article III § 1.) One of those duties is the duty to remove the corporate trustee. (CRT, Article III, § 3.) Article III, Section 1(c) of the CRT states, “Except where otherwise expressly provided or prohibited, all other discretionary decisions not otherwise delineated under this agreement may be performed by the individual trustees.” (CRT, Article III § 1.)

Under Article I, Sections 1 and 2 of the CRT, during the lifetimes of the settlors, the CRT is required to distribute to the settlors or surviving settlor a unitrust payment equal to 10.87% of the net fair market value of the CRT’s assets as valued on the first day of the taxable year in monthly installments on the last day of each month. (CRT, Article I, §§1 & 2.) John Bunn is deceased; Marilyn Bunn is entitled to the unitrust payment for the rest of her life. *Id.*

Delaney claims that in 2001 he was appointed as successor independent trustee of the CRT, replacing the corporate trustee. (Am. Compl. ¶12; and Memorandum in Opposition to the Motion for Summary Judgment, Ex. A., ¶ 3.) Delaney is an attorney licensed to practice in the State of South Carolina. Delaney advised and counseled the Settlers on tax and estate planning matters, including the CRT. (Am. Complaint, ¶ 12.) Wells Fargo is the current investment advisor of the CRT and manages 100% of the CRT’s assets. (Am. Complaint, ¶ 19.)

The assets of the CRT are the sole means of financial support for Marilyn W. Bunn, and they are decreasing as a consequence of the payment of annual fees combined with of the unitrust payments. (Am. Compl., ¶ 48.) The CRT was funded in 1993 with approximately \$4,500,000.00, but the value of the CRT decreased to \$882,366.81 as of December 31, 2013. (February 11, 2015 Lochmandy Affidavit, ¶7.) In 2014, Delaney charged a trustee fee of \$3,000.00 per month on the CRT, which equates to an annual trustee fee of \$36,000.00. (February 11, 2015 Lochmandy Affidavit, ¶¶8, 11.) Based on the 2013 CRT year-end balance of \$882,366.81, Delaney's annual 2014 trustee's fee was equal to 4.08% of the total value of the CRT. (February 11, 2015 Lochmandy Affidavit, ¶12.)

Marilyn Bunn is eighty-three (83) years old (DOB: August 27, 1932) and resides in Gwinnett County, Georgia. (Memorandum in Support of the Motion for Summary Judgment, Ex. B.) On September 5, 2013, the Probate Court of Gwinnett County, Georgia found Marilyn Bunn to be incapacitated and appointed Denise Suddes as her guardian. *Id.* At the time, Marilyn Bunn had two living daughters, Lochmandy and Kelly Bunn. On September 11, 2013, counsel for Respondents informed Delaney's counsel that a guardian had been appointed for Marilyn Bunn, provided a copy of the September 5, 2013 Order, and requested trust documents on behalf of Suddes, as guardian for the surviving settlor, and Lochmandy and Kelly Bunn, as successor individual trustees. (July 16, 2015 Lochmandy Affidavit, Exhibit B.) On October 7, 2013, counsel for Respondents again requested a complete accounting for the CRT and other documents related to the administration of the CRT. (July 16, 2015 Lochmandy Affidavit, Exhibit C.) In the October 7, 2013, letter, counsel for Respondents also

requested that Suddes, Lochmandy, and Kelly Bunn receive copies of all CRT statements and 1099's from that time forward. Kelly Bunn died on February 26, 2014.

On June 17, 2014, Delaney executed a document titled, "Appointment of Successor Individual Trustee," attempting to remove Lochmandy as the successor individual trustee of the CRT and naming himself as the interim successor individual trustee of the CRT. (March 12, 2015 Delaney Affidavit, Ex. A.) Suddes and Lochmandy refused to recognize Delaney's attempt to remove and replace the successor individual trustee. Thereafter, on June 30, 2014, counsel for Respondents served Delaney with a Notice of Removal of Trustee. (July 16, 2015 Lochmandy Affidavit, Exhibit D; and Complaint, ¶ 28.) The Notice of Removal of Trustee informed Delaney that Suddes and Lochmandy were exercising their rights under Article III, Section 3 of the CRT to remove the successor independent trustee to the corporate trustee. Delaney refused to sign the Acknowledgement of Receipt of Notice of Removal of Trustee and has refused to resign as the successor independent trustee.

In addition to seeking the removal of Delaney without cause pursuant to Article III, § 3 of the CRT, the Respondents also seek removal for cause based on Delaney's excessive fees, lack of cooperation, and other misconduct. Of note, Respondents were involved in prior litigation with Delaney (Consolidated cases: Case No. 2013-GC-0700035; and 2013-GC-0700045), in which Respondents sought to remove Delaney as the trustee of an irrevocable trust based on his misconduct. The parties to the prior litigation settled and, as part of the settlement, Delaney was replaced as the trustee. It should also be noted that Delaney received a Notice of Formal Charges from the South Carolina Commission on Lawyer Conduct on December 28, 2012 (Case No. 2012-CLC-

010), arising out of his misconduct related to estate planning and service as trustee of an irrevocable trust in South Carolina. Upon information and belief, this matter is ongoing.

ARGUMENTS

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. See *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). “To survive summary judgment the evidence [in support of the non-moving party] must amount to more than mere speculation of conjecture.” *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010)(Hearn, J. concurring)(citing *McKnight v. S.C. Dept. of Cor.*, 385 S.C. 380, 390, 684 S.E.2d 566, 781 (Ct. App. 2009).

I. MARGARET LOCHMANDY BECAME THE SUCCESSOR INDIVIDUAL TRUSTEE UNDER THE SUCCESSOR PROVISION OF THE CHARITABLE REMAINDER TRUST.

A. Margaret Lochmandy automatically became the successor individual trustee.

The rules for individual trustee succession are set forth in the CRT. (CRT, Art. III, § 2.) The terms of succession are mandatory and automatic; the successor trustees are not required to take any formal steps to accept their position. *Id.* Upon the death of one of the settlors, the surviving settlor “shall act as the sole individual trustee hereunder.” *Id.* at p. 8. Should the surviving spouse resign or be unable to serve as trustee, Lochmandy and her sister Kelly Bunn “shall act as the successor individual co-trustees hereunder.” *Id.* If one of the daughters is unable to serve because of resignation, refusal or inability, the surviving daughter “shall act as the individual trustee hereunder.” *Id.*

The settlors were named as the original individual co-trustees of the CRT. John Bunn predeceased Marilyn Bunn, leaving her as the sole individual trustee. (Am. Compl., ¶ 13.) When Marilyn Bunn was declared incapacitated in 2013, she was no longer competent to act as individual trustee. Lochmandy and Kelly Bunn automatically became the individual co-trustees pursuant to the terms of the CRT. Kelly Bunn died on February 26, 2014. (Am. Compl., ¶ 17.) The trial court properly ruled that upon the death of Kelly Bunn, Lochmandy became the sole successor individual trustee of the CRT.

Lochmandy's automatic appointment as successor individual trustee is supported by the Appointment of Successor Individual Trustee document drafted and signed by Delaney. In the Appointment of Successor Individual Trustee, executed by Delaney and notarized on June 17, 2014, Delaney represented that "as a result of the Order, Denise Suddes ("Guardian") was appointed permanent guardianship over Marilyn W. Bunn and Margaret Mary Bunn Lochmandy and Kelly Kathleen Bunn were to become the first successor individual trustees of the Trust...." (March 12, 2015 Delaney Affidavit, Ex. A, p. 1.) Furthermore, Delaney represented that "after the death of Kelly Kathleen Bunn... Margaret Mary Bunn Lochmandy became the sole successor individual trustee under Section 2 of Article III (page 8) of the Trust...." *Id.* While the document goes on to state that Lochmandy has not taken sufficient steps to accept the role as trustee, the language contained on page 1 betrays the truth of the matter – that upon the death of her sister, Lochmandy immediately became the sole successor individual trustee of the CRT.

In an attempt to obscure the issue, Delaney also now takes the position that the appointment of a guardian for Marilyn Bunn changes the successor individual trustee

analysis. Delaney accurately points out that S.C. Code Ann. § 62-7-704(a) states, “a vacancy in a trusteeship occurs if: (6) a guardian or conservator is appointed for an individual serving as trustee.” S.C. Code Ann. § 62-7-704(a)(6). Respondents argue, and the trial court held, that no vacancy occurred in the CRT after the appointment of Suddes as guardian because Lochmandy and Kelly Bunn automatically became successor individual trustees. The question of vacancy does not affect the holding on this issue, however, because the terms of the CRT control trustee succession. S.C. Code Ann. § 62-7-704(d), states, “A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following priority: (1) by a person designated in the terms of the trust to act as a successor trustee; (2) by a person selected by the charitable organizations...; and (3) by a person appointed by the court.” In the present case, the CRT contains a succession provision with mandatory terms. According to the CRT Lochmandy and Kelly Bunn were named as the successor individual trustees. Whether (i) no vacancy was created or (ii) a vacancy was created and immediately filled is of no consequence – the outcome is the same. Under either scenario, Lochmandy is the successor individual trustee.

B. Margaret Lochmandy accepted her role as successor individual trustee of the CRT.

Delaney argues that neither Lochmandy nor Kelly Bunn succeeded to the position of successor individual trustee because they did not take formal measures to accept the position. (Answer, ¶ 12.) It is not required that successor trustees undertake any formal steps to accept a position as trustee. S.C. Code Ann. § 62-7-701, Accepting or declining trusteeship, governs acceptance and rejection of the role as successor trustee. S.C. Code Ann. § 62-7-701. Section 701(a)(1) states, “Except as otherwise provided in subsection

(c), a person designated as trustee accepts the trusteeship: (1) by substantially complying with the method of acceptance provided in the terms of the trust..." *Id.* The CRT contains no formal requirement for acceptance.

Section 701(a)(2) states, "a person designated as trustee accepts the trusteeship: (2) if the terms of the trust do not provide a method... by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of trustee." Formal, written acceptance is not required by the trust code. "[I]n order to accept, one doesn't necessarily have to go and sign some instrument and say, 'I accept the trust.' That frequently is done; a man may sign the instrument and say 'I accept the trust imposed on me by the foregoing instrument.' One doesn't have to do that specific act. One may, by act or conduct, or by a course of conduct, do things which show that he has accepted the trust, without his having ever specifically said, 'I accept the trust imposed on me.'" *Gibert v. Glenn*, 156 S.E. 326, 329 (1930); see also Cohen, Mark, *Nat'l. Academy of Elder Law Attorneys Journal Quarterly*, Vol. 2, Chpt. 060202 (2006)("[A] trustee may accept office in any way that indicates intent to do so.").

Lochmandy's actions leave no question about her acceptance as successor individual trustee. As stated above, it is the responsibility of the corporate trustee (or its successor) to "collect all income of the trust, maintain and have custody of all the records of the trust..." (CRT, Art. III, §1(a).) And it is the investment advisor's "sole duty and responsibility to direct the investment of all assets of the trust..." (CRT, Art. III, §1(b).) As such, Lochmandy did not have authority to demand custody of the CRT assets or to exercise control over the management/investment of the CRT assets. To the contrary, the

role of the individual trustee is simply to participate in “discretionary decisions,” as long as those decisions do not affect his or her interest in the CRT. (CRT, Art. III, §1(c).)

Immediately following the adjudication of incapacity of Marilyn Bunn, counsel for Respondents provided a copy of the Gwinnett County Probate Court Order to Delaney’s counsel. (July 16, 2015 Lochmandy Affidavit, Ex. B.) The letter identified Lochmandy and her sister, Kelly Bunn, as “successor trustees” of the CRT and reiterated the outstanding demand for CRT documents. *Id.* Additionally, on October 7, 2013, counsel for Respondents again requested CRT documents on behalf of Lochmandy, Kelly Bunn, and Suddes and demanded that they be provided all CRT statements and 1099’s from that date forward. (July 16, 2015 Lochmandy Affidavit, Ex. C.) It is disingenuous that Delaney now complains that Lochmandy and Kelly Bunn did not do enough to accept their role as successor individual trustees, while at the same time he refused to provide copies of the trust documents repeatedly requested by counsel for Respondents.

Finally, as stated above, in June of 2014, Lochmandy refused to sign the Appointment of Successor Individual Trustee drafted by Delaney, exercised her right to remove Delaney as the successor independent trustee, and, ultimately, filed the Verified Petition. (July 16, 2015 Lochmandy Affidavit, Ex. D; and Verified Petition.) Lochmandy’s actions evidence her acceptance of the role as successor individual trustee. Based on the above-referenced actions, there is no question of fact regarding whether Lochmandy accepted her role as successor individual trustee of the CRT.

C. Margaret Lochmandy did not reject the role of successor individual trustee.

There is no evidence that Lochmandy rejected her role as successor individual trustee of the CRT. S.C. Code Ann. § 62-7-701(b) governs rejection of a trusteeship.

Section 701(b) states, “A person designated as trustee *who has not yet accepted trusteeship* may reject the trusteeship.” S.C. Code Ann. § 62-7-701(b)(emphasis added). As set forth above, Lochmandy accepted her role as successor individual trustee, so this provision does not apply. Nevertheless, even if the court finds that there is a question of fact regarding Lochmandy’s acceptance, there is no evidence in the record, whatsoever, that Lochmandy rejected her role as successor.

Delaney complains that the trial court improperly shifted the burden of proof to Delaney, as the non-movant, on the question of rejection. This argument is unavailing. Delaney argues that Lochmandy’s failure to take formal steps to accept the role as successor individual trustee amounts to a rejection. In fact, the trial court acknowledged that there are no formal requirements for acceptance in the trust code and noted, “[s]hould the successor trustee not wish to serve, the South Carolina Trust Code requires the named successor trustee to reject the trusteeship, to resign or to be disqualified, or to be removed in order for a vacancy to occur. (S.C. Code Ann § 62-7-704(a)(Suppl. 2014)).” (Order Granting Summary Judgment, p. 6.) The language of the CRT – “resignation, refusal, or inability” – closely follows the language of Section 704. Based on language of Section 704 and the CRT, the trial court viewed the evidence in the light most favorable to the non-movant and properly found that Delaney presented no scintilla of evidence of rejection, resignation, or disqualification. *Id.*

II. DENISE SUDDER AND MARGARET LOCHMANDY HAVE THE AUTHORITY TO REMOVE DELANEY AS THE SUCCESSOR INDEPENDENT TRUSTEE OF THE CHARITABLE REMAINDER TRUST WITHOUT CAUSE.

A. Denise Sudder is a duly appointed Guardian for Marilyn Bunn.

Marilyn Bunn is the surviving settlor of the CRT, but she is mentally incapacitated. On September 5, 2013, the Probate Court of Gwinnett County, Georgia, where she resides, ordered that Mrs. Bunn was incapacitated and appointed Suddes as her guardian. (Memorandum in Support of the Motion for Summary Judgment, Ex. B.) The September 5, 2013 Order states, "the guardian is expressly authorized to initiate or respond to litigation, as necessary, to modify the Trusts, remove and replace the current trustees of the Trusts, and pursue damages arising out of the conduct of one or more of the trustees of the Trusts." *Id.*, at p. 2, Section 3.

The September 5, 2013 Order is entitled to full faith and credit by the courts of the State of South Carolina. The Full Faith and Credit Clause provides, in pertinent part, that "[f]ull faith and credit shall be given in each state to the ... judicial proceedings of every other state." U.S. Const. art. IV, § 1. Full faith and credit "generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it." *Durfee v. Duke*, 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963). Delaney has not filed any action in Georgia to question the procedure or findings of the Georgia court; he now attempts to raise the specter of impropriety by citing to the handling of Marilyn Bunn's bank accounts in 2014. Delaney's arguments do not change the res judicata effect of the September 5, 2013 Order. The trial court properly afforded full faith and credit to the appointment of a guardian for Marilyn Bunn.

B. Denise Suddes and Margaret Lochmandy have the power to remove Delaney without cause.

Under the CRT, the settlor *or* the individual trustee may remove the corporate trustee without cause. Article III, Section 3 of the CRT governs the removal of trustees

of the CRT. Section 3 states, in relevant part: “[T]he settlors during their lifetime, the survivor of them after one of their deaths, or the individual trustee, may remove the corporate trustee at any time or times, with or without cause, and appoint an individual or corporation as successor independent trustee . . .” (CRT, Art. III, § 3.) As it relates to the settlors – the same section of the CRT states, “The guardian or conservator of a settlor under disability or an agent of the settlors acting pursuant to a durable power of attorney shall receive notice and have *authority to act for settlors* under this article.” (CRT, Art. III, § 3.) Therefore, Suddes, as guardian, has the power to act for the surviving settlor and remove the corporate trustee without cause. As stated above, Lochmandy, acting as the duly appointed successor individual trustee, also has the power to remove the corporate trustee without cause.

Suddes’ and Lochmandy’s power to remove trustees without cause extends to the removal of successor independent trustees. The primary consideration in interpreting and construing a trust is to discern the testator’s intent. *Holcombe-Burdette v. Bank of America*, 371 S.C. 648, 657, 640 S.E.2d 480, 484 (Ct. App. 2006) (citing *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005); *Bowles v. Bradley*, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995) (“The primary consideration in construing a trust is to discern the settlor’s intent.”)). “In ascertaining a settlor’s intent, if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and the effect of the instrument.” *Holcombe-Burdette v. Bank of America*, 371 S.C. at 658, 640 S.E.2d at 485 (citing *Chiles v. Chiles*, 270 S.C. 379, 384, 242 S.E.2d 426, 429 (1978); *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005) (affirming trial court’s construction of testamentary trust language relating to

trustee's discretionary powers); *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005)(construing the plain language of trust specifically to authorize trustee to enter into settlements); and *Estate of Stevens v. Lutch*, 365 S.C. 427, 617 S.E.2d 736 (Ct. App. 2005) (relying on the trust language as most persuasive of settlor's intent regarding discretionary power of trustee)).

"[C]onstruction depends upon the trustor's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires or thoughts after the event." *Chiles*, 270 S.C. at 384, 242 S.E.2d at 429 (quoting *Brock v. Hall*, 33 Cal.2d 885, 206 P.2d 360 (1949)). "Extrinsic evidence is not admissible to alter the plain language of a trust instrument." *Holcombe-Burdette v. Bank of America*, 371 S.C. at 658, 640 S.E.2d at 485 (citing *Bowles*, 319 S.C. at 380, 461 S.E.2d at 813).

It is also well-accepted in this state that the rules of construction for wills apply to the interpretation of trust documents. S.C. Code Ann. §62-7-112 (Supp. 2014); see also *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715 (2005) ("In fact, the law relating to discerning the drafter's intent is identical for wills and trusts.") (citing *All Saints Parish, Waccamaw v. Protestant Episcopal Church*, 358 S.C. 209, 224 n. 10, 595 S.E.2d 253, 262 n. 10 (Ct. App. 2004)). "The paramount rule of will construction is to determine and give effect to the testator's intent." *Estate of Gill v. Clemson Univ. Found.*, 397 S.C. 419, 725 S.E.2d 516, (S.C. App. 2012) (citation omitted).

"The cardinal rule of will construction is to determine and give effect to the testator's intent from a reading of the will as a whole." *Epworth Children's Home*, 365 S.C. at 165, 616 S.E.2d at 714-715 (2005) (citing *Matter of Clark*, 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992); *May v. Riley*, 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983);

Albergotti v. Summers, 205 S.C. 179, 182, 31 S.E.2d 129, 130 (1944)). “A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and with the will as a whole.” *Id.* 365 S.C. at 166, 616 S.E.2d at 715 (citing *King v. S.C. Tax Comm.*, 253 S.C. 646, 649, 173 S.E.2d 92, 93 (1970); *Wise v. Poston*, 281 S.C. 574, 578, 316 S.E.2d 412, 414 (Ct. App.1984).

The plain and unambiguous language of the CRT proves the Settlers’ intention for the settlor and individual trustees to have the authority to remove the corporate trustee and successor independent trustees without cause. First, the CRT places no significance on the identity of the corporate trustee. Security Investment Management and Trust, Co. is named as the original corporate trustee, but the CRT contemplates removal. (CRT, Art. III, § 3.) The CRT does not specify the identity of the successor independent trustee, but leaves the discretion to select the successor to the settlors and the individual trustees. The only restriction on the selection of the successor independent trustee is that it cannot be a company or person controlled by or legally obligated to the settlors. (CRT, Art. III, § 3.)

Second, the CRT states that the settlors or the individual trustee may “remove the corporate trustee at any time or times, with or without cause...” *Id.* By including the phrase, “or times”, the settlors demonstrated the clear intent that the settlors or individual trustees would be empowered to remove the corporate trustee or its independent successors more than once. There is no other way to interpret this language. If the court adopts Delaney’s restrictive interpretation of the CRT, it would render this language from

Section 3 meaningless, which violates a tenet of trust interpretation. See *Epworth Children's Home*, 365 S.C. at 165, 616 S.E.2d at 714-715 (2005).

Third, Section 3 uses the phrase “a successor independent trustee.” If the Settlers only intended for the corporate trustee to be replaced once, as Delaney urges, the CRT could and should have used the phrase “the” to describe a singular successor independent trustee. This is not the case. The CRT does not state that the successor independent trustee shall serve as a permanent trustee or that there is no way to remove the successor.

Fourth, Delaney argues that the CRT does not expressly empower the settlor or the individual trustee to remove the successor independent trustee and, therefore, summary judgment was improper. The catchall provision for individual trustees, when read together with the removal provision in Section 3, provides clarification on the removal powers. The CRT conferred “except where expressly prohibited, all other discretionary decisions not otherwise delineated under this agreement [to] the individual trustees.” (CRT, Art. III, § 1(c)). Lest there be any confusion as to the removal powers, the CRT ensures that the individual trustees and their successors are authorized to carry out the intentions of the settlors. Given that the settlors clearly and unambiguously authorized the removal of the corporate trustee, it only follows reason that the individual trustees and their successors are authorized to remove the successor independent trustees.

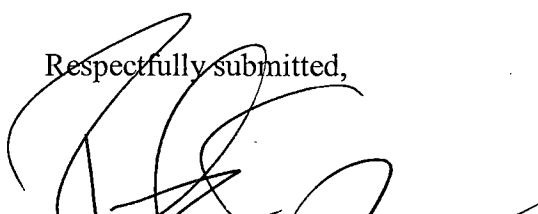
Finally, the rules for successor trustees in the S.C. Trust code support the position that the removal provision applies equally to the successor independent trustee. SC Code Ann. § 62-7-812 states “Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee”. SC Code

Ann. § 62-7-812 (Supp. 2014). Section 812 makes it clear that successor trustees stand in the shoes of their predecessor trustees. The CRT similarly states that the “every successor trustee shall have all the powers given the originally named trustees.” (CRT, Art. III, §4.) In the present case, the CRT authorizes the settlor’s guardian and the successor individual trustee to remove the corporate trustee without cause. The intent of the settlor is clear in the CRT and is supported by the catchall provision regarding the powers of the individual trustees. (CRT, Art. III, § 1(c).) Because there is no genuine question of material fact relating to the power to remove Delaney, as successor independent trustee, this court should affirm the trial court’s order granting partial summary judgment and permitting the Respondents to remove Delaney without cause.

CONCLUSION

For the reasons stated above, the trial court’s Order granting summary judgment should be affirmed in its entirety.

Respectfully submitted,



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Attorney for Respondents

January 19, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Appellate Case No. 2015-001813
Lower Case No. 2014-CP-07-1732

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JAN 25 2016
SC Court of Appeals

Marilyn W. Bunn, a person non compos mentis by and through her guardian, Denise Suddes, and Margaret Bunn Lochmandy Respondents,

v.

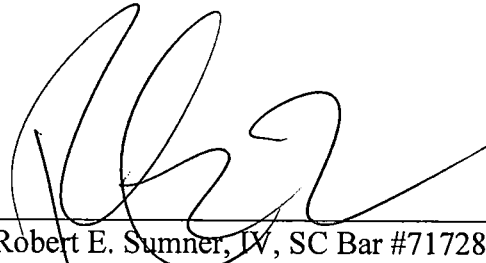
Douglas S. Delaney, as Trustee and in his individual capacity, Alan Wilson, the South Carolina Attorney General, Sacred Heart-Griffin High School, St. Joseph's Home, Quincy University, Notre Dame, The Lawrenceville School, All Saints Catholic Church, and Habitat for Humanity c/o All Saints Catholic Church Defendants,

Of Whom Douglas S. Delaney is the Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the foregoing *Initial Brief of Respondent*, and *Respondents' Designation of Matter to be Included in the Record on Appeal* by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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Attorney for Respondents

January 19, 2016
Charleston, South Carolina

Moore & Van Allen

January 19, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Re: Marilyn W. Bunn, et al., v. Douglas S. Delaney, et al.
Appellate Case No. 2015-001813
MVA File No. 038025.1

Dear Ms. Kitchings:

With regard to the above referenced action, enclosed for filing please find an original and one (1) copy of each of the following:

1. Initial Brief of Respondents;
2. Respondents' Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

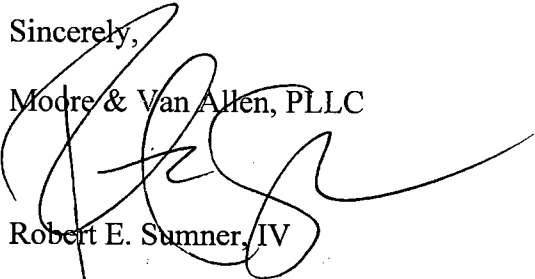
Please file the originals and return a date-stamped copy of each to me in the stamped, self-addressed envelope enclosed.

By copy of this letter, I am serving a copy of the foregoing pleading on counsel of record.

Thank you for your assistance in this matter and please call me with any questions.

Sincerely,

Moore & Van Allen, PLLC

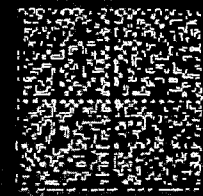

Robert E. Sumner, IV

RES/ws

Enclosures: as stated

cc: Sean Michael Bolchoz, Esquire

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JAN 25 2016

SC Court of Appeals

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